In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5496

NATIONAL SURETY COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Opening Brief

CALDWELL & LYCETTE,
Attorneys for Appellant.

1311 Alaska Building
Seattle, Washington

MARTIN & DICKSON, *Printers*

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This appeal was perfected by filing a notice of appeal, assignments of error, bond and citation on appeal, on April 23, 1928, prior to the return to the rules requiring a petition and order allowing appeal.

The appeal involves only questions of law. The testimony is extremely short and undisputed.

This appeal is from a judgment in favor of the United States after a hearing on a Writ of Scire Facias on a bail bond.

STATEMENT OF THE CASE

A. *History.* In order that a proper understanding of the relation of the events, pleadings and evidence in the case may be had, we present a brief history. One Charles Unverzagt was originally arrested by the U. S. Marshal at Blaine, Washington, in removal proceedings, on May 5, 1924, on a fugitive warrant based on two indictments pending against him in a New York federal court. He was brought before a commissioner at Bellingham, Washington, and immediately sought a writ of habeas corpus, which was granted by Judge Neterer on May 6, 1924, and made returnable the following day, May 7, 1924 (Tr. 28). On May 7, 1924, the marshal made his return and hearing was had on the return; an order was made discharging the writ, fixing the bond on appeal at $10,000.00, granting an order of removal in default of bail, and granting a motion for stay of proceedings until "Friday (May 9) for the entry of a *final order.*" The journal entry made at that time reads (Tr. 28):

> "Now on this 7th day of May, 1924, this cause comes on for hearing on petition for writ of habeas corpus which is argued and writ will be discharged. Bond on appeal is fixed at $10,000.00 and an order of removal is granted in default of $10,000 bail. Motion to stay proceedings is granted to Friday A. M. for entry of final order. Journal No. 12, page 190."

No final order was ever entered on "Friday" May 9, or at any other time. A petition for appeal was filed and an order entered allowing the appeal and fixing the appeal bond at $10,000. This bail bond on appeal was filed.

The Government's theory of this case is that, thereafter the appeal came before this Circuit Court and the decision of the trial court was affirmed; that after the affirmance, to-wit: on May 13, 1925, Unverzagt was called to come into the district court and obey the order (of May 9, 1924) discharging the writ of habeas corpus and ordering his removal to New York; that he "came not but made default;" that thereupon, on *ex parte* motion of the Government, a forfeiture *nisi* of the bail was made. The writ of *scire facias* here involved was based on that judgment *nisi*.

It will also appear that after Unverzagt had obtained a writ of habeas corpus to test the legality of his *first* arrest, of May 5, 1924, and while he was at

liberty on a $10,000 bail bond on appeal executed by this appellant as surety, pending the outcome of his appeal from the decision discharging the writ of habeas corpus, he was *again arrested* by the U. S. Marshal. This *second* arrest was on the same charge as the one on which he was originally arrested. Unverzagt sued out a second writ of habeas corpus to test the legality of his second arrest, and on the writ being discharged he took an appeal in said *second* case, and obtained his liberty on an entirely new $10,000 *property* bond, with new sureties.

B. *Pleadings—The Writ.* The writ (Tr. 1-3) alleges in substance: That on May 9, 1924, a bail bond for $10,000 was executed by the defendant, Unverzagt, as principal and the National Surety Company as surety, *conditioned* for the appearance of Unverzagt before the *district* court at Seattle, to abide by and obey a judgment or order of said court *previously* entered against him "discharging the writ of habeas corpus and ordering his removal" to a district court in New York; said bail bond was filed with the clerk; that on May 13, 1925, said Unverzagt, being called to answer and obey said order previously entered, which order had been appealed from and affirmed by the Circuit Court, came not but defaulted; that on motion

of the United States it was considered by the court that said Unverzagt as principal, and appellant as surety, forfeit $10,000 "according to the tenor and effect of said recognizance and *property* bond," unless they appear and show cause to the contrary. Then follows the summons to appear and show cause why the judgment *nisi* should not be made absolute and execution issue for the amount due on said *property* bond.

Amended Return and Answer (Tr. 4-8). The appellant's amended return and answer admits that it, as surety, executed a $10,000 bail bond on May 9, 1924, for Unverzagt; but denies that said bail bond was conditioned for Unverzagt's appearance in said court to obey a judgment and order of said court previously entered against Unverzagt; denies that on May 13, 1925, or at any other time, Unverzagt was called to come in and obey an order previously entered against him; and denies that appellant or said Unverzagt made any default whatsoever on said bond.

The answer then alleges, as a *first affirmative defense* (Tr. 5-6), that Unverzagt was *first* arrested at Blaine, Washington, on May 5, 1924, on a fugitive warrant based on two indictments in New York; that habeas corpus proceedings were instituted in the dis-

trict court at Seattle to test the legality of the arrest (the bail bond in question was given on appeal in said *first* proceeding); that during the pendency of said habeas corpus proceedings said Unverzagt was again arrested, and that said *second* arrest was based upon one of the same New York indictments upon which he had originally been arrested; that habeas corpus proceedings were instituted to test the legality of said second arrest; that in said second proceedings the writ was again discharged and an appeal taken to the Circuit Court, and Unverzagt given his liberty on a new $10,000 *property* bonds with individuals, Casey and Pendleton, as sureties; and that said second appeal was to test the legality of the arrest on one of the indictments on which Unverzagt had originally been arrested at Blaine; *that said second arrest was on the same charge on which said Unverzagt was originally arrested,* and that said property bond superseded and took the place of the first bail bond previously executed by appellant.

The *second affirmative defense* (Tr. 7) alleges that the writ of *scire facias* issued summoned appellant to show cause why execution should not be issued against it under said "*property bond,*" and that the property bond intended to be forfeited was the property bond

signed by Unverzagt with Casey and Pendleton as sureties; that the *scire facias* should have been directed to said Unverzagt, Casey and Pendleton; that the writ issued against appellant was issued by mistake.

The *third affirmative defense* (Tr. 7) alleges that at the time appellant executed the first bond, the only order which had been issued was an order dismissing the writ of habeas corpus; that particularly no order of removal had been issued; that Unverzagt has never been ordered to do anything which he had not done; that Unverzagt has not failed to obey any order which he was bound by said bond to obey.

The *fourth affirmative defense* (Tr. 8) alleges that the writ of *scire facias* alleges that said Unverzagt failed to abide by the judgment of the court previously entered; that the writ of *scire facias* was null and void.

Reply. No reply was made to any of the four affirmative defenses.

TRIAL AND DEMURRER

On these pleadings (writ and amended answer) the cause came to trial before the court without a jury, a written waiver of jury having been filed (Tr. 9).

The proceedings and evidence, extremely short and uncontradicted, are brought here by bill of exceptions (Tr. 22-24).

The *Bill of Exceptions* recites that the cause came on regularly for trial and the following proceedings were had and testimony taken (Tr. 23); Mr. Coles, counsel for the Government, stated that the Government was ready; that he wished to interpose an oral demurrer to the answer. Counsel for the defendant stated that he had no objection to the demurrer being made orally at that time, and suggested that it would be best to have the case tried on the evidence. The court proceeded to consider the demurrer, and the following took place (Tr. 23):

> "Thereupon Mr. Coles offered in evidence the bond in the case, and on being asked by the court what he had to say on the demurrer, replied: 'I have to say this, Your Honor, that the amended answer set up by the National Surety Company I believe in no way constitutes a defense to this bond or to the forfeiture'."

Thereupon argument was made and at the end of the argument the demurrer interposed by the Government was sustained, and exception taken. The defendant elected to stand on its answer and the demurrer was again sustained (Tr. 24):

"Thereupon counsel for the Government asked that the forfeiture be made absolute, and counsel for defendant again stated that it elects to stand on the answer and take an exception. The court thereupon asked if there was anything else to be offered, and counsel for the Government stated that was all. The court thereupon ordered that the forfeiture be made absolute and an order be prepared and submitted.

"Thereupon counsel for the defendant asked how the matter had been disposed of, whether on the demurrer or the evidence; to which the court replied that counsel for the Government had introduced in evidence the bond, and the Court stated that he decided the case on both the evidence and the demurrer."

It will thus be noted that the Government admitted the affirmative allegations of the answer by failing to reply to them, and by demurring to their sufficiency, at the time of the trial; that the court sustained the Government's demurrer to the answer, and also decided the case on both the demurrer and the evidence; that the only evidence whatsoever introduced to support the judgment on the merits was the bond itself. These matters are the basis of appellant's assignments of error and claim for reversal.

Motion for New Trial. A petition for new trial was timely filed (Tr. 13) alleging error as follows: That the court erred (a) in sustaining the Govern-

ment's oral demurrer to the amended answer, (b) in denying the defendant's motion for non-suit, (c) in entering judgment for the plaintiff, and refusing to enter judgment for the defendant; (d) that the evidence was insufficient to justify the decision in that (1) it appeared from the evidence that the clerk's docket in the cause that no order was previously entered herein discharging the writ of habeas corpus and ordering the defendant's removal to another district; (2) it appeared that no order was ever made by this court which the defendant has not complied with; (3) there is no evidence whatsoever to show that the defendant had been called into court to answer or abide by any order previously entered which had been appealed from and affirmed by the Circuit Court of Appeals; (4) that there is no evidence that the defendant Unverzagt made default; (5) that there is no evidence that the defendant at any time failed to obey the order of this court, which he was bound to obey, and which was covered by said bond; (6) that it appears affirmatively from the evidence that the bond in the case was superseded by a subsequent property bond; (7) that the bond was given to be effective only if this court was reversed by the Circuit Court of Appeals, and it appears affirmatively herein that the judgment was not reversed, but affirmed.

The petition was supported by an uncontradicted affidavit (Tr. 15) setting forth that the records and files show that no order was at any time made by the court discharging the writ of habeas corpus and ordering the removal of the defendant as claimed.

A written order (Tr. 16) was entered, denying the petition for new trial and re-hearing.

Judgment. Thereafter a formal written judgment (Tr. 10) for $10,000 was entered against appellant and an exception taken. This appeal follows:

ASSIGNMENTS OF ERROR (Tr. 18)

Errors were assigned as follows: (1) That the court erred in sustaining the plaintiff and respondent's demurrer to defendant's answer; (2) that the court erred in granting judgment for the plaintiff and respondent; (3) that the court erred in refusing to grant judgment for the defendant and appellant; (4) that the court erred in refusing to grant the defendant's petition for new trial.

ARGUMENT

I.

THE COURT ERRED IN SUSTAINING THE DEMURRER TO THE ANSWER (ASSIGNMENT OF ERROR NO. 1).

A. *A demurrer to the answer cannot be sustained where the answer denies material and essential allegations of the writ.*

It is elementary that scire facias proceedings on a bail bond are, in effect, the commencement of a new or original action. The writ is simply the declaration or complaint. It must state facts constituting a complete cause of action. The defendant must plead to the writ by demurrer or answer. Where the answer contains affirmative matter plaintiff must demur or reply. Likewise, plaintiff must prove all the essential allegations pleaded.

Hollister v. U. S., 145 Fed. 773, p. 779;

Kirk v. U. S., 124 Fed. 324;

Kirk v. U. S., 131 Fed. 331;

Winder v. Caldwell, 14 L. Ed. 487, p. 491;

U. S. v. Hall, 37 L. Ed. 332, 147 U. S. 687;

Universal Transport Co. v. National Surety Co., 252 Fed. 293;

Davis v. Packard, 8 L. Ed. 684;

Dixon v. Wilkinson, 11 L. Ed. 491;

24 R. C. L. 676, Sec. 17;

3 R. C. L. 65, Sec. 80;

35 Cyc. 1152-4-8;

Foster on Federal Practice, pp. 2379-83.

Hollister v. U. S., 145 Fed. 773, *supra,* contains an excellent discussion with many citations from the Supreme Court on the nature of a writ of scire facias.

At page 779 it is said:

> "A writ of scire facias on a forfeited recognizance is a judicial writ founded upon, and to be proved by, the record of the court taking it. Decisions of state courts are numerous and conflicting as to whether it is the commencement of a civil action or a continuation of some other original proceeding, whether it performs the function of a writ only or those of a writ and declaration, and whether the defendant may plead to the writ or whether the plea goes to the record on which it is founded. But as the decisions of the Supreme Court of the United States are clear and controlling on these questions, the long list of cases to which our attention is called need not be considered for the purpose of extracting a rule for our government. In *Winder v. Caldwell,* 14 How. 434, 14 L. Ed. 487, it is said:
>
> " 'A scire facias is a judicial writ used to enforce the execution of some matter of record, on which it is usually founded; but though a judicial writ, or writ of execution, it is so far an original that the defendant may plead to it. As it discloses the facts on which it is founded, and requires an

answer from the defendant, it is in the nature of a declaration, and the plea is properly to the writ.'

"In *United States v. Payne,* 147 U. S. 687, 13 Sup. Ct. 442, 37 L. Ed. 332, it is said: 'While a scire facias to revive a judgment is merely a continuation of the original suit, a scire facias upon a recognizance * * * * is as much an original cause as an action of debt upon a recognizance, or a bill in equity to annual a patent,' citing *Winder v. Caldwell,* and *Stone v. U. S.*, 2 Wall 525, 16 L. Ed. 765."

In *U. S. v. John W. Payne,* 147 U. S. 687, 37 L. Ed. 332, it was said: ffl

"A scire facias upon a recognizance * * * * is as much an original cause as an action of debt upon a recognizance * * * *."

In 3 *R. C. L.* p. 65, Sec. 80, it is said:

"Scire facias against bail is the commencement of a new action, because it issues against a person who was not a party to the record in the original action."

In *Kirk v. U. S.,* 124 Fed. 324, it is said, at p. 336:

"In the scire facias proceedings properly instituted by due service, the defendant may appear and plead and have a trial of all questions and matters of defense, and the proceeding is but a suit to enforce the penalty of the recognizance, and differs from any other suit to enforce it only in the process by which it is commenced."

Thus it is obvious that the writ (complaint) must allege all the facts constituting the cause of action.

This the respondent recognized because it pleaded the facts. The defendant, however, had a right to deny the existence of any or all of the material allegations. When the answer made such denial, an issue of fact was presented, which precluded disposition of the case by demurrer. The court having sustained the demurrer, the defendant was refused the right to compel the plaintiff to prove the denied facts, or to disprove such denied facts if established by the plaintiff. In other words, sustaining the demurrer precluded any defense to the action.

An examination of the pleadings will disclose that certain material facts were denied. Later in this brief we will show that not only was the defendant refused the right to deny the facts, but that the plaintiff was granted judgment without proving the facts.

(1) The writ alleges (Tr. 2) that the bond on which the suit was brought "was conditioned for the appearance of the said defendant before the U. S. District Court * * * * at Seattle and from time to time and term to term thereafter, to abide by and obey a judgment and order of this court previously entered against said defendant, discharging a writ of habeas corpus and ordering his removal to the United States District Court * * * * of New York." And fol-

lows this later with the allegation that Unverzagt was called to come and abide by the order previously entered against him.

The answer admits the bond *but* denies (Tr. 5) that such was the condition of the bond. If it was not the condition of the bond then there would be no cause of action. A bond conditioned other than as alleged would be a good defense. Consequently the demurrer was bad.

(2) The writ alleges (Tr. 2), that after giving the bond, to-wit: on May 13, 1925, Unverzagt was called to come into court and obey the order previously entered. The answer (Tr. 5) denies that Unverzagt was so called on May 13, 1925, or at any other time. This certainly was sufficient to raise an issue of fact.

PLAINTIFF WAS BOUND TO PROVE A BREACH OF THE CONDITION OF THE BOND BY SHOWING THAT THE DEFENDANT WAS CALLED AND DID NOT COME.

Dillingham v. U. S., 7 Fed. Cas. 3913;

U. S. v. Rundlett, 27 Fed. Cas. 16208; 6 C. J. 1072;

Brooks v. U. S. (Okla.), 27 Pac. 311;

Note in 5 L. R. A. (N. S.), 402;

State v. Dorr (W. Va.), 53 S. E. 120, 5 L.R.A. (N. S.) 402;

State v. Kinne, 39 N. Hamp. 138;
Philbrick v. Buxton, 43 N. Hamp. 463.

In *Dillingham v. U. S.,* 7 Fed. Cas. No. 3913, plaintiff failed to prove that the defendant was called. The Honorable J. Washington held this a necessity, saying:

> "We hold it to be essential to the breach of the condition upon which the forfeiture is to arise, that the party who is recognized to appear, shall be solemnly called before his default is entered; and even if the default can be proved by the parol evidence of the magistrate before whom the appearance was to be, which we very seriously question, it should clearly be proved that the party was called and warned, and neglected to appear. This is far from being a matter of form only, but, on the contrary, is a humane provision to prevent a forfeiture accruing from the ignorance or inattention of the accused."

In *U. S. v. Rundlett,* 27 Fed. Cas. No. 16208, an action on a recognizance, it was said:

> "To maintain an action on a recognizance the declaration must show a breach of the conditions * * * *. One of these rules of law requires the principal cognizor to be called and his default entered; the legal effect of the condition is such, that it is not broken by non-appearance, generally, to be proved by any evidence, but only non-appearance in answer to a call, to be proved by an entry made on the minutes of the magistrate, and returned by him as part of the proceedings. This has been decided in New Hampshire, and else-

where, upon reasons which to me are satisfactory. *State v. Chesley,* 4 N. Hamp. 366; *Dillingham v. U. S.,* Fed. Cas. No. 3913; *State v. Grigsby,* 3 Yerg. 280; *White v. State,* 5 Yerg. 183; *Clark v. State,* 4 Ga. 329. It is clear also that the declaration must show a default to answer to a call, made at a time and place, when and where the cognizor was bound by law to answer."

In *Brooks v. U. S.* (Okla.), 27 Pac. 311, in a suit on a recognizance, it was held, at p. 311:

"Every precedent of such action, which we have found, indicates that such suits are always based on recognizances duly forfeited by judicial order, and that the declaration in every such case must allege that the defendant in the recognizance was duly called at the proper time and place, and the recognizance forfeited. It is unquestionable that the breach must be established by record, and cannot be shown by proof *aliunde. People v. Van Eps,* 4 Wend. 388. It is essential to a breach of the contract of a recognizance that the declaration must show that the party who was to appear was solemnly called and warned."

In the note in 5 L. R. A. (N. S.), 402, it is stated:

"The weight of authority holds, although, as subsequently shown, there are several exceptions, that it is essential that a defendant who has given a recognizance to appear in court at a certain time, should be formally called; and the record must show not only that he was present, but that he was called, before a default can possibly be entered against him or his surety." (Citing cases.)

Consequently, the denial in the answer of the allegation that Unverzagt was called, raised an issue of fact, and it was error to sustain the demurrer to the answer.

(3) The writ further alleges (Tr. 2) that the defendant made default. This the answer directly denies (Tr. 5); and further denies said fact affirmatively by alleging (Tr. 7) that Unverzagt had never been ordered to do anything which he had not done; that he had not failed to obey any order which he was bound by said bond to obey, and that Unverzagt had not failed to abide by any order of court previously entered.

The authorities cited clearly show that it is necessary to allege and prove a default. Consequently, a denial that a default occurred raises a proper issue of fact.

B. *Each of the four affirmative defenses in the answer constitutes a good defense.*

(1) *First Affirmative Defense* (Tr. 5-6). The first affirmative defense alleges in substance that the defendant Unverzagt was *first* arrested at Blaine, Washington, on May 7, 1925, on a fugitive warrant based on two indictments against him in New York, and habeas corpus proceedings were instituted to test

the legality of this arrest. It was in this first proceeding that Unverzagt gave the bond here in question as an appeal bond to obtain his liberty while an appeal was pending on the first habeas corpus proceeding. The affirmative defense then alleges that while the first habeas corpus proceeding was still pending the defendant Unverzagt was arrested a *second time* on one of the *same* New York indictments upon which he was arrested the first time. On the second arrest he again instituted habeas corpus proceedings, and on the writ being discharged he appealed to this court and pending appeal obtained his release upon a second and entirely new $10,000 bond, with new sureties, "that said appeal (second) was to test the legality of the arrest on one of the indictments said defendant had been originally arrested on, at Blaine, Washington; that said second arrest was on the same charge on which said Unverzagt was originally arrested; that said property bond superseded and took the place of the aforesaid bail bond previously executed by this surety." (Tr. 6.)

A Re-Arrest On the Same Charge Releases the Bail.

6 Corpus Juris, 1027;
3 R. C. L. 52, Sec. 63;
U. S. v. Atwell, 24 Fed. Cas. No. 14475.

It is almost too elementary to require citation of authorities that the re-arrest of the defendant on the same charge discharges his sureties. The consideration for the bail bond is the liberty given the defendant. When that is taken from the defendant the consideration fails.

Likewise the surety undertakes his obligation on condition that he becomes the defendant's jailer. When the government itself elects to become jailer the surety has no further right or duty and the bond is discharged. The rule is well stated in 6 Corpus Juris, 1027:

> "Where, after giving bail, the prisoner is re-arrested or ordered into custody on the same charge or for the same offense, his sureties are discharged, as the only consideration on the undertaking accruing to the sureties is their custody of the prisoner, and when this consideration fails their liability ceases, nor are they liable where the prisoner escaped after such arrest."

So also see 3 R. C. L. p. 52, Sec. 63.

In *U. S. v. Atwell,* 24 Fed. Cas. No. 14475, it was said, at p. 890:

> "He (surety) would be discharged from the obligation of his liability if the United States subsequently arrested the principal on a bench warrant or an indictment for the same offense * * *."

Consequently, the affirmative defense alleging that the defendant was re-arrested by the United States, and that said second arrest was on the same charge on which he was originally arrested, stated a good defense, and the demurrer was improperly sustained.

(2) *Second Affirmative Defense.* It will be noted that the bail bond in question (Tr. 25) was a *"corporate surety"* bond, given by a company authorized to engage in that business. The bond given in the second arrest was a *"property bond"* signed by two individuals.

The writ in this case refers to the "property bond," and the second affirmative defense alleges (Tr. 7):

> "That the writ of scire facias issued herein summons said principal and surety to show cause, if any they have, why they ought not to have execution issued against them under said 'property bond;' that the bond intended to be forfeited is the property bond signed by Chas. H. Unverzagt as principal, and M. H. Casey and Agnes A. Pendleton, as sureties; that said writ of scire facias should have been directed to said Chas. H. Unverzagt and said M. H. Casey and said Agnes A. Pendleton; that the writ issued against this surety was issued by mistake."

This is admitted by the demurrer. Consequently, a good defense was stated.

(3) *Third Affirmative Defense* (Tr. 7). The writ (Tr. 2) alleges that Unverzagt gave a bond to secure his appearance for *removal* to New York pursuant to an order previously entered, thus, "to abide by and obey a judgment and order of this court previously entered against said defendant discharging the writ of habeas corpus and ordering his removal to the U. S. District Court for * * * * New York," and that he failed to appear for removal.

This third affirmative defense first denies that any such order of removal was ever made. Obviously Unverzagt could not fail to appear for removal if no order of removal was ever made. Consequently this defense was a good one and required proof by the plaintiff.

Furthermore, this defense alleges (Tr. 7) that Unverzagt had never been ordered to do anything which he had not done; that he had not failed to obey any order which he was bound by said bond to obey. This in itself constitutes a good defense, for certainly a bond could not be forfeited where the defendant had done everything he had been required to do, and had not failed to do anything the bond required him to do.

(4) *The Fourth Affirmative Defense* in effect realleges the matters set forth in the third affirmative

defense, viz (Tr. 8): that the writ claims Unverzagt failed to abide by the judgment of the court previously entered; that in fact Unverzagt had not failed to abide by any order of the court previously entered.

The defendant was certainly entitled to prove that Unverzagt had never failed to abide by any judgment previously entered, *or,* compel the Government to prove that Unverzagt had so failed. Either proposition raises an issue of fact.

THEREFORE, the answer was proof against demurrer, because (1) denials of essential allegations of the writ raised material issues of fact; and (2) the four affirmative defenses were good.

IT IS ERROR TO SUSTAIN A GENERAL DEMURRER TO A PLEADING WHICH IS GOOD IN ANY PART.

Heid v. Edner, 133 Fed. 156, CCA 9;

State v. Caruso, 137 Wash. 519, 243 Pac. 14;

Whitenack v. Philadelphia & R. R. Co., 57 Fed. 901, CCA;

Burders v. Mazetta Mfg. Co., 198 Fed. 855, CCA7;

Eldorado Coal & M. Co. v. Mariotti, 215 Fed. 51 CCA7;

Rem. Comp. Stat. Washington, Secs. 264, 276, 277, 278.

In *Heid v. Edner,* 133 Fed. 156, this Court passed upon this exact question. The Court said, p. 157:

> "The errors relied upon by the defendant are the action of the trial court in sustaining plaintiff's demurred to the amended answer * * * *. Defendant's answer consisted of two parts; the first, a denial of the material allegations of the complaint; and second, a defense setting up new matters.
>
> "The demurrer to the answer was general, on the ground that it did not state facts sufficient to constitute a defense. Section 68 of the Code of Civil Procedure of Alaska provides: 'The plaintiff may demur to an answer containing new matters when it appears upon the face thereof that said new matter does not constitute a defense or counterclaim * * * *'. In *Tobey v. Ferguson,* 3 Ore. 28, the Supreme Court of Oregon had before it an action for false imprisonment. The defendant had denied some of the allegations in the complaint, and had made further answer. The plaintiff demurred to this further answer. The court found that a portion of this further answer was well pleaded and amounted to a defense, that, as the demurrer struck at the whole of the further answer, it should be overruled. In the present case, the demurrer was to the whole of the answer, and should have been overruled, first, because the answer denied the material allegations of the complaint, and to that extent was a good pleading; and, second, because the demurrer was not directed to the new matter set up in the answer as required by the code.
>
> "The order of the court sustaining this demurrer recited that the court treated the demurrer also as a motion to make the answer more

> definite and certain. But this recital did not dispose of the issue raised by the general denial of the answer, nor did it confine the demurrer to the new matter in the answer."

The statutes of Washington are similar. Rem. Comp. Stat. Sec. 264:

> "The answer of the defendant must contain, 1, a general or specific denial of each material allegation of the complaint controverted by the defendant * * * *; 2, a statement of any new matter constituting a defense * * * *."

Sec. 276:

> "The plaintiff may demur to an answer containing new matter when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim, or he may for like cause demur to one or more of such defenses or counterclaims, and reply to the residue."

In *State v. Caruso,* 137 Wash. 519, 243, P. 14, exactly the same ruling was made in an action on a bail bond.

Conclusion—Those matters were all brought to the court's attention on the petition for new trial (Tr. 13), and it was error to sustain the demurrer to the answer.

The points just considered have a further bearing on the case and clearly show that not only should the demurrer have been overruled, but also that judgment should have been given for defendant.

II.

THE COURT ERRED IN GRANTING JUDGMENT FOR PLAINTIFF (RESPONDENT) AND ERRED IN REFUSING TO GRANT JUDGMENT FOR DEFENDANT (APPELLANT). (ASSIGNMENTS OF ERROR NOS. 2 AND 3.)

A. The *four affirmative defenses set forth in the answer are admitted and constitute a complete defense.*

In General. The answer (Tr. 4-8) contains four affirmative defenses. No reply was filed to any of these defenses, the Government taking the position that none of the defenses constituted a defense to the bond forfeiture. The Government put in evidence the bond and demurred to the answer. The bill of exceptions (Tr. 23) shows that the case was called for trial, the Government stated it was ready for trial; the Government demurred; counsel for appellant suggested that the cause be tried on the merits; counsel for the Government put in evidence the bond; the proceedings being as follows (Tr. 23):

> "Thereupon Mr. Coles offered in evidence the bond in the case, and on being asked by the court what he had to say on the demurrer replied: 'I have to say this, Your Honor, that the amended answer set up by the National Surety Company I believe in no way constitutes a defense to this bond or to the forfeiture.'

> "Thereupon argument was made by counsel for the defendant. At the end of the argument the oral demurrer interposed by counsel for the Government was sustained by the court, to which an exception was taken and allowed by the court."

Appellant elected to stand upon its answer. The court then granted judgment for the Government on the merits.

The allegations in the four affirmative defenses in the answer were admitted by the failure of the plaintiff to reply to them, and were further admitted by the plaintiff's demurrer to them during the course of the trial, stating, after evidence was submitted, as above quoted, that the amended answer set up by the National Surety Company in no way constitutes a defense to the bond or the forfeiture.

LAW

As stated before, the writ is but the complaint or declaration and the plaintiff must answer to it. See cases cited above, p. 12.

The plaintiff must reply to the affirmative matter in the answer.

35 Cyc. 1154-5;

Rem. Comp. Stat. Washington, Secs. 264, 276, 277, 278;

21 R. C. L. Sec. 120, p. 561;
Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134;
Smith v. Ormsby, 20 Wash. 396, 55 Pac. 570;
Johnson v. Maxwell, 2 Wash. 482, 25 Pac. 904;
English v. Arizona, 214 U. S. 359;
Deputron v. Young, 134 U. S. 241, 33 L. Ed. 923.

The scire facias is either governed by the common law or by the Washington code. Under the common law the plaintiff was, of course, required to reply to the affirmative matter in the answer. Failure so to do irrevocably admits the truth of the affirmative allegations of the answer.

In *Pierce v. Brown,* 7 Wall. 205, 19 L. Ed. 134, it was said, at p. 136:

> "The legal effect of a replication is, that it puts at issue all matters well alleged in the answer, and the rule is, that if none be filed, the answer will be taken as true, and no evidence can be given by the complainant to contradict anything which is therein well alleged. 1 Barb. Ch. Cr. 249; *Mills v. Pitman,* 1 Paige Ch. Cr. 490; *Pierce v. West,*. 1 Pet. G. C. 351; Story Eq. Pl. 878; Cooper Eq. Pl. 329."

In 21 R. C .L. Sec. 120, p. 561, it is said:

> "One of the primary rules of pleading is that where there is a material averment, which is traversible, but which is not traversed by the other party, it is admitted."

Washington Statutes and Decisions

Under the Federal practice rule (R. S. 721) the matter of pleading is, of course, governed by the state statutes. Rule 10 of this district also so provides. The *Washington statutes* require a reply, and in the absence of a reply the allegations of the answer are admitted. Rem. Comp. Stat. of Washington, Secs. 264, 270-277. Rem. 264:

> "The answer of the defendant must contain, 1, a general or specific denial of each material allegation of the complaint controverted by the defendant * * * *; 2, a statement of any new matter constituting a defense * * * *."

Sec. 276:

> "The plaintiff may demur to an answer containing new matter, when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim, or he may for like cause demur to one or more of such defenses or counterclaims, and reply to the residue."

Sec. 277:

> "When the answer contains new matter constituting a defense or counterclaim the plaintiff may reply to such new matter, denying generally or specifically the allegations controverted by him * * * * and he may allege in ordinary concise language * * * * any new matter not inconsistent with the complaint, constituting a defense to such new matter in the answer."

Sec. 278:

> "If the answer contains a statement of new matter constituting a defense * * * * and the plaintiff failed to reply or demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it, he may have a jury called to assess the damages."

In *Johnson v. Maxwell,* 2 Wash. 482, 25 Pac. 570, it was said, p. 483:

> "No reply was filed by plaintiff to the affirmative allegations of the answer, and on the trial counsel for defendant claimed that those allegations were thereby admitted to be true. The court ruled otherwise, and treated the affirmative matter as denied, and permitted testimony to be given accordingly. This is in direct contravention of Sec. 103 of the code, which provides that every material allegation of new matter in the answer, not controverted by the reply, shall, for the purpose of the action, be taken as true, and was error."

In *Smith v. Ormsby,* 20 Wash. 396, 55 Pac. 570, it was held that the failure to reply to affirmative matter in the answer gives such affirmative matter the force of a finding of fact by the court, the court saying, at p. 398:

> "The answer affirmatively set up that the contract, upon which the judgment was obtained, was void, because at the time of his entering into it, the town was beyond the constitutional limit of

> indebtedness. To this there was no reply, and that part of the answer pertaining to it must be considered as equivalent to a finding of the court."

The demurrer made during the time of the trial, together with the reply, presented a situation similar to a motion by the Government for judgment on the pleadings, so that it remains simply to be seen whether or not the answer presented facts constituting a good defense. If it did, the allegations being admitted, the judgment should be reversed with instructions to grant judgment for the appellant.

A GOOD DEFENSE WAS PRESENTED

(1) *The first affirmative defense* (Tr. 5-6) has already been discussed (p. 19-20 herein), where it was shown that said defense presented a case of re-arrest on the same charge as the defendant was originally arrested upon. It was alleged that Unverzagt was originally arrested at Blaine on a fugitive warrant; habeas corpus proceedings brought to test the legality of the arrest; the writ discharged; an appeal taken, and the bail bond on appeal here in question given; that during the pendency of said proceedings Unverzagt was again arrested; "that said second arrest was on the same charge on which said Unverzagt was originally arrested;" that habeas corpus proceedings

were again brought; the writ discharged; a second appeal taken with a new and distinct bail bond on appeal with new sureties given.

As pointed out above (p. 20) the law is well settled that a second arrest on the same charge releases the sureties on the original bond. (*See cases and quotations above, p.* 20 *herein.*)

Result. Consequently this defense is good, and being admitted in such manner as to make it virtually a finding of fact (*Smith v. Ormsby,* 20 Wash. 396 *supra*) the judgment was erroneous and should be reversed with instructions to dismiss.

(2) *Second Affirmative Defense* (Tr. 7). It will be remembered that on the first arrest a *"corporate surety"* bond was given. On the second arrest a *"property bond"* with Casey and Pendleton as sureties was given. The second affirmative defense alleges that the writ of scire facias in this action was against said "property bond;" that the bond intended to be forfeited is the property bond signed by Unverzagt and Casey and Pendleton; that the writ of scire facias should have been directed to Casey and Pendleton; that the writ issued against this defendant was issued by mistake.

Certainly, if these facts are true, and the truth is admitted by the demurrer and failure to reply, the action must be dismissed.

(3) *Third Affirmative Defense* (Tr. 7) alleges that at the time defendant executed its bond for Unverzagt the only order which had been issued was an order dismissing the writ of habeas corpus; that in particular no order or removal had been issued; that Unverzagt had never been ordered to do anything which he had not done; that he has not failed to obey any order which he was bound by said bond to obey.

A. The writ is based on the theory that Unverzagt made default in failing to appear and abide by an order previously made "ordering his (Unversagt's) removal to the U. S. District Court * * * * of New York."

This defense sets up affirmatively "that no order of removal had been issued * * * *; that said Unverzagt has never been ordered to do anything which he has not done; that Unverzagt has not failed to obey any order which he was bound by said bond to obey." Certainly, if this be true, and it is admitted by failure to reply, there could be no default and the judgment should be reversed and dismissed.

(4) *The Fourth Affirmative Defense* (Tr. 8) alleges substantially the same things and in substance states that said Unverzagt did not fail to abide by any order of the court previously entered.

Conclusion—The facts alleged in the four affirmative defenses were admitted both by demurrer and failure to reply, and constitute and have the force of a finding of fact by the court. They state a good defense and the action should be reversed and dismissed.

III.

THE MERITS

In Any Event the Government Failed to Prove the Facts Essential to Establish Its Case (Assignments of Error Nos. 2 and 3).

THE UNCONTRADICTED EVIDENCE REQUIRES A JUDGMENT FOR DEFENDANT.

Decision of Trial Court. The testimony offered was uncontradicted and the trial court not only decided the case on the demurrer but also gave judgment *on the merits* (Tr. 24). Formal written judgment was entered subsequently (Tr. 10).

Was there any evidence whatsoever to support the judgment?

The cases cited show that the writ must of necessity allege certain essential facts, and that those facts must be proved. The plaintiff here utterly failed to prove the necessary facts.

The writ alleges the following essential facts: (1) That said bond was conditioned for the appearance of Unversagt before the district court at Seattle from time to time and term to term, and to abide by and obey an order and judgment of the district court previously entered discharging the writ of habeas corpus and directing his removal (Tr. 2). (2) That on May 13, 1925, Unverzagt was called to come into court and abide by the previous order of the court (Tr. 2). (3) That the order appealed from had been affirmed; (4) that Unverzagt came not. That Unverzagt defaulted; that the bond was forfeited and judgment *nisi* rendered. This was all denied (Tr. 5-8).

To determine whether or not these facts were proved we must *examine the bill of exceptions* (Tr. 22-25) which as certified by the court contains all of the evidence in the case.

It will be found that the only evidence offered was the bail bond itself. After this was offered the following occurred (Tr. 24):

"The court thereupon asked if there was anything else to be offered, and counsel for the Government stated that that was all. The court thereupon ordered that the forfeiture be made absolute and an order be prepared and submitted.

"Thereupon counsel for defendant asked how the matter had been disposed of, whether on the demurrer or the evidence; to which the court replied that counsel for the Government had introduced in evidence the bond and the court stated that he decided the case on both the evidence and the demurrer * * * *."

Generally: Scire facias, so far as the federal courts are concerned, is a new and independent action. The writ is the complaint, and the defendant must answer. Plaintiff must prove his cause with competent evidence and must put in evidence records on which he relies. The records are not parts of the scire facias proceeding (Cases cited later).

A. From an examination of the bill of exceptions it is at once apparent that there was *no proof whatsoever* that there was any "judgment and order of this court (district court) previously entered against said defendant (Unverzagt) discharging a writ of habeas corpus and ordering his removal to the U. S. District Court * * * * for New York" (Tr. 2).

Rule 33 of this court provides for the giving of bail in habeas corpus proceedings as follows: "2.

Pending an appeal from the *final decision* of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court * * * *."

Proof of a final order was necessary.

Proof of this fact was essential. Unless such order or judgment was placed in evidence the trial court could not say that the defendant had made any default. How can this court, from the evidence submitted, say there was any such order? How can it say that the defendant failed to obey such orders if they were not put in evidence? The Government was bound to prove these facts by placing in evidence the original or duly authenticated copies of the record—without proof of such facts the plaintiff's case failed. (Authorities are cited later, p. 39.)

The alleged judgment and order were not offered in evidence because they never existed.

B. No proof whatsoever that the defendant was ever called on May 13, 1925, or at any other time. That Unverzagt was called on May 13, 1925, or at any other time, was vigorously denied (Tr. 5).

(1) *This must be proved;* (2) *it can only be proved in one way—by the production of the records.*

Dillingham v. U. S., 7 Fed. Cas. No. 3913;

U. S. v. Rundlett, 27 Fed. Cas. No. 16208;

Note in 5 L. R. A. (N. S.) 402;

State v. Dorr, 5 L. R. A. (N. S.) 402, 53 S. W. 120;

Brooks v. U. S., 27 Pac. 311;

3 R. C. L. 62, Sec. 75;

Hunt v. U. S., 61 Fed. 795;

Nelson v. State, 73 S. W. 398.

Extensive quotations from cases showing the necessity of proof that the defendant was called have heretofore been made at p. 16-18 herein.

The rule is well summarized in 3 R. C. L. p. 62, Sec. 75:

> "The calling of the accused and the entry of the default of record appear to be preliminary requisites of the forfeiture of a recognizance * * * *. The reason for insisting upon these formal requisites has been placed upon the ground that they constitute *necessary evidence* in a proceeding to recover on the bond. The effect of the condition in the recognizance being such that it is not broken by non-appearance generally, to be proved by any evidence, but only by non-appearance in answer to a call, *to be proved by an entry made on the minutes of the court*, and returned as a part of the proceedings, a declaration in the suit must aver that the prisoner was called into court and his default judicially declared."

Hollister v. U. S., 145 Fed. 773, contains a complete discussion of scire facias. It is there laid down that the record on which the case issues is not a part of the case but is evidence which must be introduced to prove the case. In that case it is said, after discussing Supreme Court decisions, at p. 780:

> "From the principles announced in the foregoing authorities certain conclusions inevitably follow: First, *the record* upon which the writ issues is not a part of the declaration. *It is the evidence* on which plaintiff must rely to prove the case, and the legal sufficiency of the declaration must be determined, as in ordinary cases of pleading, from the consideration of its averments."

The court then points out, p. 781, that the records must be offered in evidence to prove the facts alleged, saying:

> "The record, when offered to prove the case, must disclose them or the case fails."

It was further held that on a denial the case presents a question of fact requiring a trial by jury.

In *Hunt v. U. S.,* 51 Fed. 795, an action of scire facias on a bail bond, the question arose as to how to prove the allegations of the writ. The court held:

> "A writ of scire facias, when issued, should only recite facts disclosed by the records and files of the court from which the writ eminates. Therefore, when the defendants named in the writ of

scire facias, by way of defense thereto, deny any of its recital, it is incumbent on the plaintiff to verify the same *by producing the records and files, and the facts in question cannot be otherwise proven.* * * * *."

In *Nelson v. State,* 73 S. W. 398, the syllabus reads:

"In scire facias on a forfeited bail bond it is essential that the judgment *nisi* be introduced in evidence."

To the same effect are *McWhorter v. State,* 14 Tex. Ap. 239; *Baker v. State,* 17 S. W. 256; *General Bonding etc. v. State* (Tex.), 165 S. W. 615.

In *Morsell v. Hall,* 14 L. Ed. 117, the Supreme Court, in considering the papers properly before the court on scire facias proceedings, holds that the various parts of the record not introduced in evidence should not be made part of the transcript, saying:

"And the proceedings upon the motion to discharge the bail form no part of the legal record in the proceedings on scire facias and ought not to have been inserted in the record and transmitted to this court."

In 35 Cyc., p. 1158, discussing scire facias, it is said:

"Plaintiff is bound to show that he is entitled to maintain the writ * * * *. Strictly speaking, no evidence can be heard on scire facias other than the record declared on * * *. Profert of the

record must be made in scire facias. Profert of books in the clerk's office is not sufficient."

In 6 Corpus Juris, discussing proceedings on forfeited bail bonds, it is said, p. 1071:

"On a general denial the burden of proof is on the state and not on the defendant * * * *.

"In actions upon forfeited recognizances or bonds, the affidavit, indictment, or information is admissible in evidence. It is also proper to admit in evidence in an action upon such an instrument, the bond or recognizance itself, provided the execution of the bond is known and provided it is properly filed. It is also proper to admit in evidence the sci. fa., the record on which it is issued, and the judgment transcript or the minutes of the court or the magistrate. But the record is an entirety, and it is error to reject a part thereof, except that the record of the proceedings subsequent to the forfeiture may be included."

At p. 1072 it is said:

"The weight and sufficiency of the evidence in an action on a bail bond or recognizance is governed by the rules regulating the weight and sufficiency of the evidence in civil cases generally. The proof may be sufficient to render the cognizors liable without offering the indictment or showing that it was ever found; but the bond or recognizance must be produced under a general denial, and the production of the bond proves its execution so that judgment may be rendered thereon, provided it is produced in a form which proves itself. The recognizance and judgment of forfeiture are held to be competent and sufficient evidence, under appropriate averments, to authorize a judgment for the state; but such bond or

> recognizance and judgment must be proved, and also a breach of the bond must be proved by the evidence of the defendant being called and neglecting to appear."

SUMMARY—The plaintiff's action, therefore, fails for lack of proof that the defendant was ever called.

C. *No proof that the defendant failed to appear, if actually called, to abide by the order of the court.*

The writ (Tr. 2) alleges that Unverzagt "came not but made default." This is vigorously denied. (Tr. 5, 7, 8).

If it were conceded that the defendant was called, still there is no evidence whatsoever in the record that Unverzagt did not appear, or that he defaulted. The bill of exceptions is absolutely silent upon this subject. Can this court say from any of the evidence submitted that Unverzagt did not appear,—that he defaulted?

The plaintiff had the burden of proving this fact as shown by the cases cited above, it was a necessary allegation and likewise necessary element of proof. Without proving that Unverzagt failed to appear, no judgment could be entered on his bond.

D. (1) *No proof that the order (if any) appealed from was affirmed, and* (2) *no proof of the order, if any, made by the Circuit Court on appeal.*

It is alleged (Tr. 2) that the (claimed) order appealed from was affirmed, but there is not one scintilla of evidence to prove this assertion. That was a part of the plaintiff's cause. Plaintiff should have placed said affirming order, or a proper copy, in evidence so this court could see such was the fact.

Rule 33 of this court, governing recognizances, provides that pending an appeal and final decision of any court, discharging the prisoner, he shall be enlarged upon recognizance with surety "for appearance *to answer the judgment of the appellate court.*" Consequently, it is necessary that the judgment of the appellate court be placed in evidence in order that it can be determined whether or not any order was made requiring the defendant to appear and answer the judgment of the *appellate court.*

Proof of this fact cannot be left to surmise and speculation.

E. *No proof of the judgment nisi.*

All of the authorities hold it essential to prove the judgment nisi, by placing in evidence a proper copy of the record, if there be any. Judgment nisi is the basis of the action. Without proof of that record the action fails. Certainly none was offered

in evidence here. (See cases cited above. Also *General Bonding Co. v. State,* 165 S. W. 615, *McWhorter v. State,* 14 Tex. Ap. 239).

F. *No proof (nor allegation) that the surety was called to produce the defendant.* The bond (Tr. 25) is joint and several. Therefore, the surety must be called, and this fact must be both alleged and proved.

In 3 R.C.L. p. 62, sec. 75, it is said:

> "Where the recognizance in its form is several rather than joint, it seems that it is necessary that each recognizance, namely, that of the principal, shall be separately forfeited in the usual manner. The principal should be called to appear, and the bail should be called to bring forth the body of the principal whom he undertook to have there that day, to forfeit his recognizance."

G. No proof of authority under or by which the bail bond was given.

It is always essential that plaintiff's scire facias proceedings allege and prove that the bond was given pursuant to some lawful authority. Here the plaintiff should have proved some order by a court or officer of competent jurisdiction, fixing or allowing the bail bond.

This is particularly true in habeas corpus, as the condition of granting bail is specifically prescribed

in *Rule* 33 of this court, which rule is above quoted. That rule requires allowance of bail only *after "final decision."* Proof of a final decision was therefore necessary.

IV.

FATAL VARIANCE BETWEEN ALLEGATIONS AND PROOF

A. *The bond sued upon in the writ is not the bond proved.*

The writ (Tr. 2) alleges that Unverzagt and appellant gave a bond, "which said bond and recognizance was conditioned for the appearance of said defendant before the U. S. District Court . . . at . . . Seattle, and from time to time and term to term thereafter, to abide by and obey a judgment and order of this court (district) previously entered against said defendant, discharging a writ of habeas corpus and ordering his removal to the U. S. District Court for . . . New York."

The appellant denied that such was the condition of the bond (Tr. 5). The bond put in evidence (Tr. 25-27) has an entirely different condition. It reads (Tr. 26):

"Now, therefore, the condition of this obligation is such that (1) if the said Charles H. Unverzagt shall appear either in person or by attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court, and (2) shall prosecute his appeal and (3) shall abide by and obey the orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and (4) shall surrender himself for execution of the judgment and decree appealed from as said court (Circuit) may direct if the judgment and order against him shall be affirmed or the appeal is dismissed; and (5) shall abide by and obey all orders made by said court or by said district court, *provided* the judgment and order against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then this obligation shall be null and void; otherwise to remain in full force and virtue."

Thus the condition of the bond sued on is entirely different from the conditions of the bond proved. This is of the highest importance, for, as shown hereafter, the defaults claimed were defaults made under the bond sued upon, but not defaults under the bond proved. As shown, the condition declared upon is not the condition prescribed by Rule 33, for appeal bonds in habeas corpus, *but* the condition of the bond proved is in accordance with the provisions of Rule 33.

Such a variance is fatal. 6 *C. J.* 1070; 35 *Cyc.* 1158.

B. *The defaults claimed in the writ are not defaults under the conditions of the bond proved.*

The writ (Tr. 2) alleges a bond with a certain condition, to-wit: Conditioned for the appearance of the defendant before the *district* court to obey an order of the *district* court previously entered. The writ then alleges facts from which a default is claimed, to-wit: (Tr. 2) the *district court* called Unverzagt on May 13th, 1925, that he came not and made default by failing to appear to answer the order of the district court previously made.

Examining the bond proved and comparing it, condition for condition, with the defaults alleged (though not proved) we find that the defaults alleged are not conditions of the bond proved:

(1) The condition of the bond proved is as follows (Tr. 26):

> "Now, therefore, the condition of this obligation is such that (1) if the said Charles H. Unverzagt shall appear either in person or by attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court."

There is neither allegation, claim nor proof that Unverzagt did not so appear before the Circuit Court.

(2) "Shall prosecute his appeal."

Again there is no claim that Unverzagt did not prosecute his appeal.

(3) "And shall abide by and obey the orders made by the Ninth Circuit Court of Appeals for the Ninth Circuit in said cause."

There is no allegation in the writ that the *Circuit Court* made any order, nor that Unverzagt failed to abide by any order of the Circuit Court. The claim is that Unverzagt failed to abide by an order of the *district court, but,* such was not the condition of the bond as given, *nor* is such the condition required by Rule 33, which provides, as above quoted, that "pending an appeal from the final decision . . . the prisoner shall be enlarged upon recognizance, with surety, *for appearance to answer the judgment of the appellate court.*" There was, therefore, no breach alleged which the bond covers. In other words, the plaintiff apparently mistook the condition of the bond to be one to answer orders of the district court, and not the Circuit Court. These things demonstrate the necessity of proving the order of the Circuit Court, if any was made.

In *U. S. v. Murphy,* 261 Fed. 751, (8CCA) the court had before it an almost identical situation. In that case an appeal bond conditioned that the defendant answer the orders of the *Circuit Court,* as did the bond here in question. The bond there was given on appeal as provided by a rule of court. The court there held that under such a bond the defendant was not required to abide by any orders of the district court, and that his sureties could not be held for any failure to abide by an order of the district court, the court saying, at p. 754:

> "The obligation of these defendants, as stated by the plain terms of the bond, does not extend to an undertaking on their part that Lew Moy and Sam Hee shall appear and obey the orders *of the trial court* and appear at the next regular term of the trial court, after the mandate of this court was sent down, for re-trial therein. This is not one of the conditions set forth in the bond in question, and there is no undertaking upon the part of these defendants that the principal shall appear at the trial court to which this case was remanded to await its action.
>
> It is suggested that the covenant on the part of the defendants that their principals would 'abide by and obey all orders made by the said Circuit Court of Appeals for the Eighth Circuit in said cause' by implication required the principal to appear for re-trial in the U. S. District Court for the district of New Mexico, at the next general term thereof, or pursuant to an

order of the trial court. It is admitted that the bonds do not comply with Rule 45. It is admitted that there is no covenant that the principal shall obey the orders of the trial court in the event of reversal or that they shall appear for re-trial. An interpretation of these bonds to imply such a liability on the part of these sureties would be to impose a liability upon them which cannot be found in their obligation, and their duty and obligation would thereby be extended beyond the plain terms of the instruments themselves. . .

The Circuit Court of Appeals for the Eighth Circuit made no order that has not been obeyed by both Lew Moy and Sam Hee, and when this court reversed the judgment and sentence against them, and ordered a new trial, the obligation of the sureties as given by them was fully performed, and the judgment of the trial court is affirmed."

(4) "or, shall surrender himself in execution of the judgment and decree appealed from as said court (Circuit) may direct if the judgment and order against him shall be affirmed, or the appeal is dismissed."

The writ does not allege that the *Circuit Court* made any order or "directed" that Unverzagt surrender himself in execution of the judgment appealed from; *nor* does the writ allege that Unverzagt failed to obey any order or direction *made by the Circuit Court; nor* was there any proof that the Circuit Court made any order which Unverzagt had failed to obey;

nor was there any proof that the Circuit Court made any order. The answer repeatedly denies that Unverzagt defaulted or failed to abide by any order which he was by his bond bound to obey.

The writ proceeds on the theory (Tr. 2) that the bond was conditioned for appearance before the *district* court to answer its orders previously made, and that Unverzagt made default by failing to answer some order of the *district* court. This is similar to the mistake made in *U. S. vs. Murphy,* 261 Fed. 751.

As shown, however. such was not the condition of the bond—nor was it the condition required by law under Rule 33.

> (5) "and shall abide by and obey all orders made by said court (Circuit Court), or by said district court, *provided* the judgment and order against him shall be *reversed* by the United States Circuit Court of Appeals for the Ninth Circuit."

The writ (Tr. 2) itself alleges that the order appealed from *was not reversed,* but affirmed. Very clearly this provision of the bond was thus applicable only to *reversal,* and not on an affirmance. However, the plaintiff has erroneously proceeded on the theory that this provision that Unverzagt obey orders made by the district court is applicable when the judgment

was affirmed, for, as above shown, the writ claims a default by reason of Unverzagt's failure to obey an order of the *district court* after the judgment was affirmed, not reversed.

The bond conditions contains two main provisions separated by semi-colons. The first relates solely to orders of the Circuit Court in the event the judgment is affirmed. The second relates to the district court only when the judgment is reversed.

Thus, the bond was in strict conformity with Rule 33, and does not cover, nor was it required to cover, the contingencies pleaded by plaintiff as defaults.

The court having decided the case on the merits, and the proof being utterly insufficient and opposed to the allegations of the writ, the judgment should be reversed and the cause dismissed.

C. "Property bond." The writ repeatedly refers to the property bond; for example (Tr. 2-3), it is alleged that the "property bond" was forfeited, and (Tr. 3) "commanded to show cause why the property bond should not be paid." The bond produced was a "corporate surety bond." It may well be that the bond given in the second case above referred

to, which was in fact a "property bond" with individual sureties (Casey and Pendleton), contains the provisions set forth in the writ, and, as set forth in the second affirmative defense (Tr. 7), was the bond intended to be proceeded against. At any rate, the bond produced was not a "property bond," nor was it conditioned as claimed.

The action should be dismissed for failure of the proof to conform with the allegations of the writ as to the conditions of the bond and defaults under the bond.

THE BOND SUED UPON IS UTTERLY VOID BECAUSE NO *FINAL* ORDER WAS EVER MADE.

V.

The writ alleges (Tr. 1-2) that the bail bond was executed and filed May 9th, 1924, and conditioned to obey an order previously entered dismissing a writ of habeas corpus and ordering Unverzagt's removal to New York. The answer denies that any such order was ever entered, and, as pointed out, no such order was proved by plaintiff.

Minute entry only. On the contrary the only order made was a *minute* entry of May 7th. From the

facts already stated it will be recalled that Unverzagt was arrested at Blaine on May 5th, 1924; that on May 6th he sued out a writ of habeas corpus returnable May 7th (see journal entry Tr. 28). On May 7th the cause came on for hearing and the following occurred (Tr. 28):

> "Now on this 7th day of May, 1924, this cause comes on for hearing on petition for writ of habeas corpus which is argued and writ will be discharged. Bond on appeal is fixed at $10,000.00 and an order of removal is granted in default of $10,000.00 bail. Motion to stay proceedings is granted to Friday A. M. *for entry of final order.*"

This oral announcement, of course, did not state *how, when or to where* the defendant was to be removed, and obviously was not sufficiently definite to form the basis of an appeal. Consequently, it was provided that a *"final order"* should be entered on *"Friday"* May 9th. However, no such *final* written order was ever entered, but on Friday, May 9th, the bond here in question was filed and an attempted appeal was taken direct from the minute entry of May 7th. (See order denying new trial, Tr. 16-17).

A. *Under such circumstances the bond was utterly void.*

(1) The Circuit Court of Appeals' jurisdiction is limited to a review of "final decisions in district courts." U. S. Comp. Stat. Sec. 1120; Judicial Code Sec. 128.

> "The Circuit Courts of Appeals shall exercise appellate jurisdiction to review on writ of error *final decisions* in the district courts . . ."

(2) The authority to grant bail in habeas corpus cases is confined to "an appeal from a *final decision* of any court or judge," Rule 33, Circuit Court of Appeals, Sec. 2 and 3.

(3) a. The order in question was on its face not a final order because provision was made for the entry of a final order. Moreover, it was too indefinite to constitute a final order.

b. By General Rules 64 and 65 of the district court of Washington, all decrees in equity and judgments at law must be in writing and signed by the court. Rule 65 provides:

> "Judgments in actions by law must be signed by the judge. It shall be the duty of the clerk, unless otherwise ordered by the court or the judge, to enter such judgments in the judgment book . . ."

A MINUTE ENTRY IS NOT SUFFICIENT TO SUPPORT AN APPEAL—FINAL JUDGMENTS MUST BE ENTERED.

Herrick v. Cutheon (CCA) 55 Fed. 6;

Herrup v. Stoneham, 15 Fed. 2nd, 49; (CCA)

Darling Lumber Co. v. Porter 256 Fed. 455; (CCA)

In re Christensen's Estate, 77 Wash. 629;

Day v. Mills, 213 Mass. 585, 100 N. E. 1113;

Trammell v. Rosen (Tex.) 157 S. W. 1161;

Hill v. Hill (Ala.), 100 So. 340.

In *Herrick v. Cutheon,* 56 Fed. 6, it appears that the court entered a written opinion (52 Fed. 47) sustaining a patent, and finding it had been infringed, and concluding with the words "decree for complainant." Thereupon, and before any decree was entered, defendant appealed. The court held:

> "Whatever may be the practice of the circuit court as to drawing out decrees before they become effective as such, it is plain that the docket entry in this case containing only the words 'opinion—decree for complainant,' does not constitute a decree for an injunction required to give this court jurisdiction, nor can the docket entry be aided for that purpose by reference to the opinion. The appeal was taken prematurely and is dismissed."

In *Herrup v. Stoneham,* 15 Fed. 2nd, 49, it was said, at p. 50:

> "To be appealable, the decision or order must be 'not only final but complete,' and final 'not only as to the parties, but as to the whole subject matter and as to all of the causes of action involved.' " Citing cases.

In *Day v. Mills* (Mass.), 100 N. E. 1113, it was said:

> "A docket entry, or an order for a docket entry, is not a final decree . . . In such case no appeal will lie."

So also in the other cases cited.

WHERE NO APPEAL WAS ALLOWABLE NO ACTION CAN BE MAINTAINED ON THE APPEAL BOND.

Steele v. Crider, 61 Fed. 484;

U. S. v. Morris Heirs, 153 Fed. 240;

Pacific Nat'l Bank v. Mixter, 124 U. S. 721; 31 L. Ed. 567;

Brounty v. Daniels (Neb.) 36 N.W. 463;

Davis v. Huth, 43 Wash. 383; 86 Pac. 654;

Loudon v. Loudon, (Cal.) 218 Pac. 442;

Jones v. Jones, 233 Ill. App. 214;

Leonard, Admr. v. Cowling, (Ky.) 87 S. W. 812;

Calvert v. Wilder, 201 S. W. 449;

Pierson v. Republic Casualty, 142 N. E. 722 (Ind.).

In *U. S. v. Morris Heirs,* 153 Fed. 240, in a suit by the United States on an appeal bond, it appeared that the defendant had no right to appeal because the order in question was one reviewable only by writ of error. It was held that since no right of appeal existed, there was no consideration for the appeal bond, and hence no action could be maintained on it.

In *Steele v. Crider,* 61 Fed. 484, it was held that an appeal bond which was given in a cause in which no appeal lies creates no obligation, the court citing several Supreme Court cases in support of its decision.

In *Brounty v. Daniels* (Neb.) 36 N. W. 463, an appeal was taken after the announcement of a decision, but before the entry of a judgment, in other words, a *premature* appeal, just as in the case at bar. It was held that no action could be maintained on the appeal bond, the court saying p. 464:

> "In the proceedings now under consideration we find that the county judge in effect, rendered the findings and verdict upon the facts similar to what is required of a jury in a similar case.

> Nothing more can be claimed for it. This being done, it then remained for the county court to render judgment against the defendant, which *was not* done. The findings of fact is not a judgment. There being no judgment from which an appeal could be taken, it would seem to be clearly apparent that the appeal bond or undertaking referred to was a nullity, and that the decision (dismissing the action) of the district court thereon was correct."

In *Davis v. Huth,* 43 Wash. 383, 86 Pac. 654, it was held that no action could be had on an appeal bond where the appellate court did not acquire jurisdiction, for the reason that "the jurisdiction of this court on appeal was the sole consideration for the bond sued on in the case. There was no other consideration."

The court further held, 86 Pac. p. 656, "that the mere fact that the bond operated as a supersedeas until the cause was dismissed made no difference. The bond was a supersedeas on the account of the appeal and for no other reason or purpose."

So here, the bond was an appeal bond given pursuant to a rule of court governing appeals from "final decisions" in habeas corpus proceedings. If there was no "final decision" there was no right to appeal, and the bond was without consideration, and was void.

Result. The decision upon which the appeal was taken was not a "final decision"; it was not appealable to the Circuit Court. Hence the appeal bond was void and the judgment should be reversed.

V.

MOTION FOR NEW TRIAL

Each and every point raised in this appeal was presented specifically in the written motion for new trial (Tr. 13) which was denied, after hearing (Tr. 16).

SUMMARY.

We respectfully submit that the judgment of the lower court should be reversed, because

I.

The court erred in sustaining the demurrer to the answer:

A. The answer denies material allegations of the writ;

1. It denies the condition of the bond as pleaded;

2. It denies that Unverzagt was called;

3. It denies that Unverzagt made default;

B. Each of the four affirmative defenses pleaded states a good defense.

II.

The court erred in granting judgment for the plaintiff and in refusing to grant judgment for defendant:

A. The four affirmative defenses set forth in the answer are admitted and constitute a complete defense.

III.

The Government failed to prove the facts essential to establish its case:

A. No proof whatsoever that the district court made any previous order discharging the writ of habeas corpus and ordering removal;

B. No proof whatsoever that the defendant was called on May 13th, 1925, or at any other time.

C. No proof that the defendant failed to appear, if called.

D. No proof that the order appealed from was affirmed, and no proof of the order made by the Circuit Court on appeal.

E. No proof of the judgment nisi.

F. No proof that the surety was called to produce the defendant.

G. No proof of authority under which the bail bond was given.

IV.

Fatal variance between allegations and proof.

A. The bond sued upon in the writ is not the bond proved.

B. The defaults claimed in the writ are not defaults under the conditions of the bond proved.

C. The bond proved was not a "property bond," as alleged.

V.

The bond sued upon is utterly void because no final order was ever made.

A. The only order made was a minute entry.

B. Under such circumstances the bond was utterly void.

1. The Circuit Court has jurisdiction over final decisions only.

2. Bail is allowable in habeas corpus appeals from final decisions only.

3. Final decisions must be in writing.

C. A minute entry is not sufficient to support an appeal, but final judgment must be entered.

D. Where no appeal was allowable no action can be maintained on the appeal bond.

Respectfully submitted,

CALDWELL & LYCETTE,

Attorneys for Appellant.